

BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS

Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:

ELIZABETH KNOX AND WILLIAM HUTCHINS,
Petitioners

Elizabeth Knox
William Hutchins

For the Petition

Robert Goff

Housing Code Inspector,
Department of Housing and
Community Affairs

Neither in Support of Nor in
Opposition to the Petition

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* Board of Appeals Case No. S-2723
* (OZAH Case No. 08-21)
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Before: Françoise M. Carrier, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

I. STATEMENT OF THE CASE

Petition No. S-2723, filed on January 14, 2008, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in a single-family residential structure located at 7108 Holly Avenue, Takoma Park, Maryland. The subject property is designated as lot 5, block 12 of Subdivision 25 (tax account number 01073091) and is classified under the R-60 Zone.

On January 18, 2008 the Board of Appeals scheduled a hearing in this matter for May 2, 2008, to be held by a Hearing Examiner with the Office of Zoning and Administrative Hearings.

Technical Staff at the Maryland-National Capital Park and Planning Commission ("MNCPPC") reviewed the petition and, in a memorandum dated April 7, 2008 (Exhibit 21),

recommended approval of the petition with conditions.¹ Technical Staff submitted supplemental information on May 7, 2008 in response to questions from the Hearing Examiner. See Ex. 26. The Montgomery County Planning Board did not consider this application.

The Department of Housing and Community Affairs (“DHCA”) inspected the property on January 30 and April 2, 2008. In memoranda dated March 2 and April 7, 2008 DHCA identified an exterior handrail that must be scraped and painted, noted that the driveway can fit two parked vehicles safely, and stated that the 328 square feet of habitable space would permit the apartment to be occupied by no more than two people. See Exs. 16, 22.

A public hearing was convened as scheduled on May 2, 2008, at which time evidence was presented in favor of the petition. No opposition was presented at the hearing, although the record includes five letters in opposition. The record was held open for a supplemental submission from Technical Staff and closed on May 7, 2008.

II. BACKGROUND

For the convenience of the reader, background information is grouped by subject matter.

A. The Subject Property

The subject property is located at 7108 Holly Avenue in Takoma Park, a few hundred feet north of Eastern Avenue and the Maryland/District of Columbia border. The property is 10,000 square feet in size, with 50 feet of frontage on Holly Avenue, and is generally rectangular in shape. It is classified under the R-60 Zone.

The subject property is developed with a single-family detached home measuring 3,108 square feet in size, containing two stories plus a basement. The building was originally constructed in 1923. A green-building renovation in 2006 added square footage with recycled building materials, and simultaneously implemented energy-efficient practices for the operation of the home. Living space is heated using a corn stove and radiant floor heating, solar energy is generated by panels located on the green roof, and stormwater is used by a backyard rain garden. See Staff

¹ The Staff Report is quoted and paraphrased liberally in Part II of this report.

Report at 4, citing *Discarded Materials Give House New Life*, Washington Post, May 12, 2007. The back yard contains a swing set and a storage shed, both aesthetically designed to match the architectural character of the home. The backyard is completely enclosed with a chain-link fence. Technical Staff indicates that the property is well landscaped, with a terrace, a pond, seven trees and numerous planting areas.

The subject property is within the Takoma Park Historic District. Historic Preservation staff supports the application because no exterior changes are proposed.

The photographs that follow show various aspects of the subject property. The house location plan/landscape and lighting plan on page five shows the locations of improvements on the site, as well as approximate locations of trees, bushes and exterior lighting.

Front of House, from Staff Report at 5



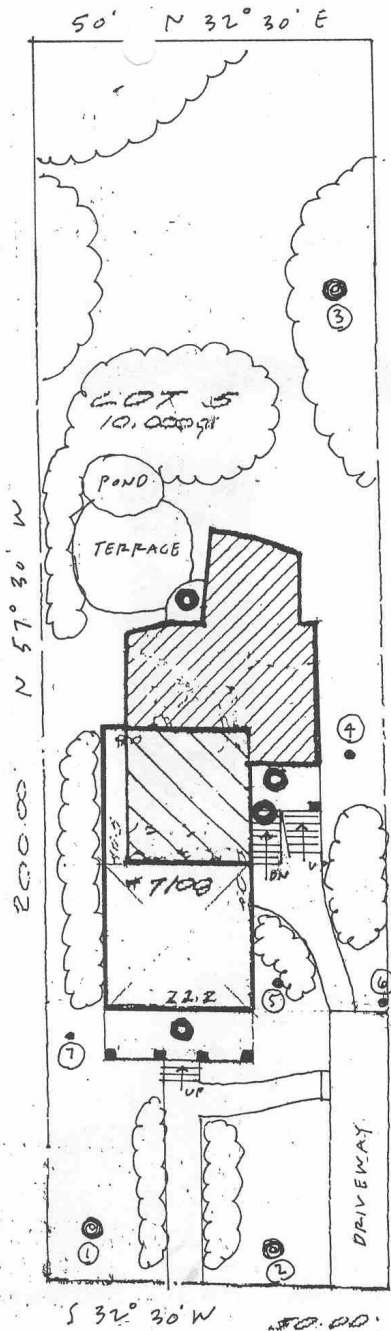
Driveway and Side of House, from Staff Report at 6



Rear of House, from Staff Report at 5



House Location Plan/Landscape and Lighting Plan, Ex. 5



TREES

- 1 - 50' OAK.
- 2 - 55' OAK
- 3 - 60' OAK
- 4 - 25' MULBERRY
- 5 - 20' DOGWOOD
- 6 - 6' JAP. MAPLE
- 7 - 5' JAP. MAPLE

- LIGHT (ALL BULBS 100W)
- TREE
- ☁ GARDEN



EXHIBIT NO. 5

B. The Neighborhood and its Character

Technical Staff defined the general neighborhood of the subject property as the area bound by an extension of single-family homes to the north, Holly Avenue and confronting homes to the east, Eastern Avenue and the D.C. border to the south, and Piney Branch Road to the west. See Staff Report at 6. The Hearing Examiner finds this definition of “neighborhood” to be acceptable for an accessory apartment case, where the expected impacts are minor. This area is shown on the vicinity map below. It is classified entirely under the R-60 Zone and developed with single-family homes. Just beyond the southern boundary of the neighborhood, on the D.C. side of the line, are five multi-family apartment buildings, all of which have parking lots with reserved spaces for residents.

Site Location and General Neighborhood, from Staff Report at 7



As noted on the vicinity map above, there are already four approved accessory apartments within the general neighborhood, three of them just a few houses away on Holly Avenue and one around the corner on Eastern Avenue. Technical Staff opined that adding a fifth apartment would not oversaturate the neighborhood with incompatible uses, because this is a densely populated area of the County that would benefit from additional dwelling units. See Staff Report at 6. Staff argues that because this area of the County is densely populated and well-served by Metro, a higher concentration of accessory apartments here “will not likely cause the same adverse effects as a similar grouping of accessory apartment in other areas of the county.” *Id.* at 22.

The Petitioners, Beth Knox and Bill Hutchins, share Technical Staff’s view, noting that they bought the subject property because it is one block from the Metro, that most neighbors were not aware that they had an apartment even when it was rented, and that they were aware of only one of the existing accessory apartments in the area, suggesting that the extra residents are not very noticeable.

C. Master Plan

The property is located within the area covered by the *2000 Takoma Park Master Plan* (the “Master Plan”), which recommends continued R-60 zoning for the subject site, a zone that permits accessory apartments by special exception. Technical Staff concluded that the proposed accessory apartment would be consistent with the Master Plan’s R-60 recommendation, its recommendation to “[r]etain the existing single-family detached character throughout most of Takoma Park, the existing mix and distribution of apartment uses, and the rights to develop existing properties to continue or to be replaced at the current density,” and its recommendation to protect and enhance Takoma Park’s historic and architectural heritage. See Staff Report at 28.

D. Proposed Use

Petitioners propose to rent a 650-square-foot dwelling unit located in the basement of their home as an accessory apartment. The main entrance to the apartment is located on the side of the house, at the end of the driveway and down a set of stairs. The photograph below shows the

main entrance to the proposed apartment, which is virtually hidden unless a viewer is in close proximity to the home (compare photograph on page 4, taken from a greater distance). Technical Staff found that at close proximity, the apartment entrance has the appearance of a basement door and does not detract from the appearance of the home as a single-family dwelling.

Main Entrance to Proposed Accessory Apartment, from Staff Report at 10.



A floor plan for the proposed accessory unit is provided on the next page. It includes a bedroom, a combined living room/kitchen area, a laundry room and one bathroom.

E. Landscaping and Lighting

As noted earlier, the site is well landscaped with trees, grass and garden plots. Exterior lighting is provided at four locations on the site, near each of the exterior entrances. Each light fixture has one 100-watt bulb. Technical Staff opined that the use has adequate exterior lighting, consistent with typical residential standards. See Staff Report at 9. Staff mistakenly identified a fifth light hanging in an oak tree, but Ms. Knox testified that there are no lights in the trees. One tree has an old birdhouse, however, that could be mistaken for a light from a distance.

Accessory Apartment Floor Plan, Ex. 6

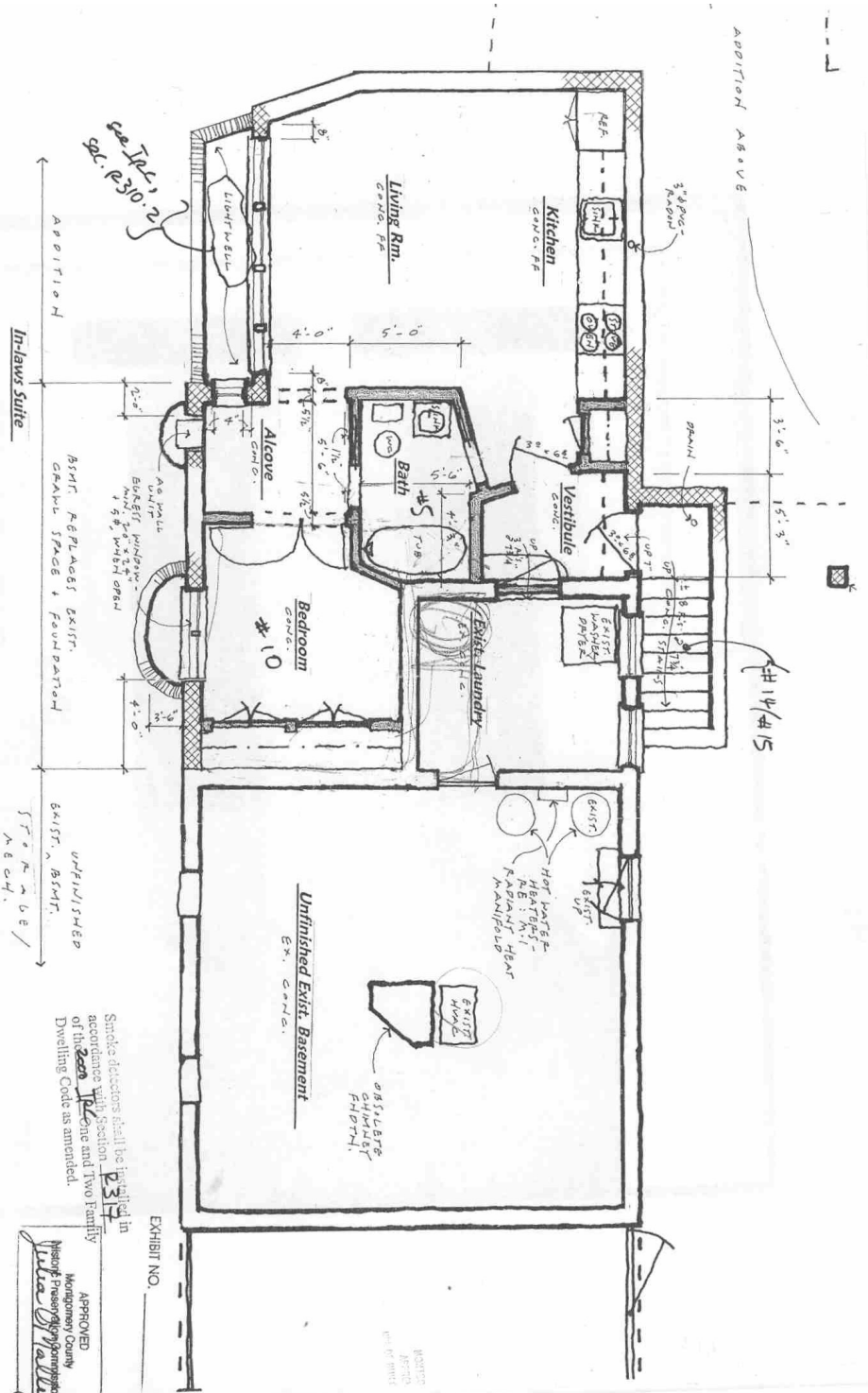


EXHIBIT NO. _____

Smoke detectors shall be installed in accordance with Section 103.1 of the 2009 Uniform Fire and Life Safety Code as amended.

APPROVED
Montgomery County
Missouri Planning Commission
Julia P. Valle

F. Parking

Technical Staff found that adequate parking exists to permit an accessory apartment because parking is available both in the driveway and on the street. Staff notes that the driveway has enough space for two cars, stacked one behind the other, and that on-street parking is permitted along the eastern side of Holly Avenue. Technical Staff found that the demand for on-street parking is relatively low on Holly Avenue, because the vast majority of homes on the street have driveways. See Staff Report at 11. Five opposition letters maintain that parking is a problem, with too many cars and not enough space. See Exs. 10, 13-15, 17. Transportation Staff observed that on-street parking along Holly Avenue does not obstruct two-way travel, although a neighbor argued the opposite in a letter. See Ex. 15. Technical Staff noted that the general neighborhood is well-served by mass transit, with Metro approximately 1,200 feet to the south, plus public buses. Because of this setting, Technical Staff concluded that there is adequate on-site and street parking to support any parking necessary to accommodate an additional household. See Staff Report at 11.

DHCA's representative at the hearing did not inspect the subject site, but noted that in many daytime inspection visits to the general neighborhood, he had not observed parking problems.

Street Parking Conditions, from Staff Report at 11



The record contains five letters in opposition, all of which cite inadequate parking as a problem in the neighborhood. See Exs. 10, 13-15, 17. One letter states that due to crime problems, the writer's family likes to park their cars where they can see them, and where they do not have to walk far to get home. See Ex. 17. This letter enclosed several photographs showing cars parked on what appears to Holly Avenue. See Exs. 17(a)-(f). Some of the cars are marked with "7108," presumably to show that these cars belong to family members who live at the subject property and park their cars on the street. Two of the photographs show the driveway at the subject site empty. One photograph was clearly taken a few houses away from the subject site, based on a comparison to Technical Staff's photograph above. None of the locations in these photographs is specifically identified, although the subject property is visible in one.

All of the submitted photographs, including Technical Staff's photo, indicate that a substantial number of drivers park on Holly Avenue. With the exception of one photograph that shows cars parked on both sides of the street (apparently in violation of parking regulations), the photographs do not support the conclusion drawn by one neighbor that the street is effectively reduced to one lane by parked cars. The evidence is inconclusive as to whether there is actually a parking problem that would be exacerbated by one additional vehicle parking in the street. Technical Staff, DHCA Staff and the Petitioners contend that there is no parking problem, and spaces are always available within half a block of the subject site. Five neighbors argue that there is a big parking problem, although one seems to define a parking problem as anything that prevents the writer's family from parking directly in front of their home. This may not be a reasonable expectation in an urban environment with few or no garages. Moreover, the photographs do not demonstrate that the Petitioners do not use their driveway, merely that, as Ms. Knox testified, the person who uses it sometimes takes the car out to drive somewhere.

The preponderance of the evidence indicates that there are some parking constraints on Holly Avenue, created by an urban population density and parking regulations that restrict parking to one side of the street. Currently, Ms. Knox parks in the driveway on the subject site and her husband and adult son park in the street. The Petitioners offered during the hearing to start keeping

two cars in their driveway and to limit their tenants to one car, so that the accessory apartment would result in no net increase in vehicles associated with the subject property parking on the street. In the Hearing Examiner's view, these commitments are sufficient to support a finding that the proposed accessory apartment would not have an adverse effect on the neighborhood due to parking.

G. Housing Inspection

The DHCA inspection report states that the total habitable area of the proposed accessory apartment is 328 square feet. See Ex. 22. Based on the housing inspector's testimony, that square footage allows the unit to be occupied by no more than two unrelated persons or a family of up to two people. The inspection report identifies scraping and painting a rusty, exterior handrail as the only repair necessary.

H. Development Standards

The existing dwelling satisfies applicable development requirements of the zone, as set forth in the following table, adapted from the Staff Report and Staff's supplemental email submission.

Compliance with Applicable Development Standards under R-60 Zone

Development Standard	Required	Provided
Minimum Lot Area	6,000 sq. ft.	10,000 sq. ft.
Minimum lot width at street line	25 ft.	50 ft.
Minimum lot width at front building line	60 ft.	50 ft. ²
Minimum setbacks		
From street	25 ft.	33 ft.
Side Yard	8 ft., 18 ft. sum of both sides	8 ft south side, 10 ft. north side
Rear Yard	20 ft.	56 ft.
Maximum building height	2.5 stories or 35 ft.	2 stories/24 ft.
Maximum building coverage	35 %	31 %

² The Staff Report mistakenly reported that the subject property was part of the area annexed to Montgomery County in 1997, and therefore is considered a conforming building if it was lawful under the Prince George's County Zoning Ordinance in effect on June 30, 1997 and was constructed under a building permit issued before February 10, 1998. As explained in Technical Staff's supplemental email submission, the subject property was not part of the annexation area. It does, however, qualify for an exemption from current development standards under Code § 59-B-5.3 because it is a single-family dwelling in a residential zone that was built on a lot legally recorded by subdivision plat before March 16, 1928 and meets the development standards of Montgomery County's 1928 Zoning Ordinance. See Ex. 26.

I. Community Participation

As noted earlier, the record contains five letters in opposition. Edward McMahon lives at 7105 Cedar Avenue, the next street parallel to Holly Avenue to the east. See Ex. 10. He states that Holly Avenue is very narrow and it is difficult to park or even drive on it; that the subject site has a shared driveway that cannot accommodate additional vehicles without hardship and inconvenience to the adjoining property owner; and that the accessory apartment law was never intended to apply to new additions on small, older houses, otherwise everyone in Takoma Park could build an addition and then apply for an accessory apartment. The Hearing Examiner notes that while the Petitioners' driveway abuts the driveway of the adjacent house, the driveways do not appear to be shared in a legal sense. Petitioners' driveway is within their property boundaries, as is presumably the case for the house next door. Moreover, Mr. McMahon appears to be mistaken concerning the intent of the accessory apartment regulations; the specific conditions for an accessory apartment explicitly permit an addition or extension to a main dwelling to create more floor space to accommodate an accessory apartment, as long as applicable development standards are met. See Code § 59-G-2.00(a)(3).

An anonymous writer contends that a residential neighborhood with families should not have strangers living in it, where people don't know who is living in a given house. See Ex. 13. This writer contends that "nobody knows anything about these people," although according to the Petitioners' testimony, their house is frequently used for community meetings and other events. The anonymous letter states that parking is a big problem, and that the neighborhood has already been through enough inconvenience from the construction process for this house. This writer suggests that if the apartment was built without a permit, it is too late now to get one. The writer is perhaps confusing the building permit process with the special exception process. A property owner is well within his or her rights to obtain a building permit, construct a home addition, then seek a special exception to rent that space as an accessory apartment.

Mary Anne O'Boyle Leary resides at 7301 Takoma Avenue, about two blocks from the subject site on the far side of Piney Branch Road. See Ex. 14. She states that about 20 years ago,

Takoma Park residents went to court to compel Montgomery County to enforce its zoning code for Takoma Park homes in the R-60 Zone, many of which had been converted into multi-family dwellings, systematically destroying whole neighborhoods. She fears that the cycle is starting all over again. In her view, Holly Avenue cannot accommodate any more parking. She questions what happened to the rule that apartments in single-family homes require off-street parking. The Hearing Examiner notes that the subject site satisfies the Zoning Ordinance requirement for an accessory apartment that the property have at least two off-street parking spaces. The Zoning Ordinance does not specify that the property must have off-street parking specifically for tenants. Ms. Leary argues that this will not be an affordable apartment, but will be rented at a market rate due to its location one block from Metro. She believes that the house on the subject site has already had a negative impact on the neighborhood because of its jarring color combinations, and that this “eyesore” should not be permitted to become “a truly destructive element in our community.” Ex. 14.

Norma Tilden, of 7214 Holly Avenue, was one of a group of citizens who worked with the County throughout the 1970s and 80s to urge enforcement of residential zoning laws and prevent further break-up of single-family homes into apartments. She argues that the proposed accessory apartment would add to traffic and parking on a block where parking is extremely limited, and where parking reduces the road to one lane. Ms. Tilden maintains that the expanded house on the subject site is “mammoth” in size and out of character with the neighborhood. She notes that the Petitioners have maintained a commercial sign for their business in their front yard for three years, and have rented the proposed accessory apartment without permission for more than a year. Ms. Knox testified that the sign Ms. Tilden complained about has been removed, and Technical Staff confirmed that the apartment is currently vacant, although it was rented for a period when the Petitioners did not know a special exception was required.

Finally, the Guard family of 7111 Holly Avenue complains that there is not enough parking on the street for the homeowners, and no renters should be permitted. The writer contends that the Petitioners leave their driveway empty and park in the street, although this was contradicted by Petitioners’ testimony. Due to crime problems in the neighborhood, the Guards prefer to park

where they can see their cars and do not have to walk far. Their letter requests that the BOA not share the letter with anyone if not necessary. All correspondence regarding a special exception application must, however, be made part of the public record.

III. SUMMARY OF HEARING

1. Robert Goff, housing inspector

Mr. Goff testified on behalf of another DHCA employee who conducted the site inspections in this case, but who was out on medical leave on the day of the hearing. His testimony was based on the other inspector's notes and a telephone conversation with the inspector.

Mr. Goff stated that the only condition that needs to be corrected is scraping and painting a rusty exterior handrail. Otherwise, the proposed accessory apartment satisfies applicable standards. Mr. Goff noted that the driveway is approximately 40 feet long and can safely accommodate two cars, one behind the other. He added that based on 328 square feet of habitable space, the apartment can be occupied by no more than two people.

Mr. Goff observed that he is familiar with the neighborhood in the immediate vicinity of the subject site and has never had any difficulty parking there during the day.

2. Elizabeth Knox, petitioner

Ms. Knox testified that she had read the Staff Report and agreed with its factual statements and conclusions with one exception. Ms. Knox noted that the Staff Report referred to lights in a tree, but she and her husband have no lights in their trees. She observed that one of the trees has a birdhouse hung by a previous owner, and one might mistake it for a light from a distance.

Ms. Knox testified that she understands that if the accessory apartment is granted, the main dwelling can be inhabited only by a family of related people, that the owners are not permitted to charge rent for more than one dwelling unit in their home, that no exterior modifications are proposed, that an owner of the property must live in the home for at least six months of every twelve, and that the apartment must have the same street address as the main dwelling. She stated that she and her husband have owned the property for more than one year.

Ms. Knox noted that because most people on Holly Avenue take Metro to work, there is not much difference in parking conditions during the day, when Technical Staff visited, and during the evening. She acknowledged that her house is unusual, perhaps a little provocative, and some people don't like it. She and her husband checked with the Takoma Park Historic Preservation office before painting the house in several different colors, some of them quite vibrant, and they were told that there were no restrictions on color. She suggested that some people just don't like the house, so they would tend to oppose anything connected with it. Ms. Knox observed that the previous owner of the subject property was an elderly woman who never used the driveway or the backyard, and some people had trouble with the change to a bigger house with more activity.

Ms. Knox is aware of one accessory apartment in the neighborhood, on the corner of Tulip and Holly Avenues, because she has seen a tenant washing her car in the street. She was not aware of the others until she saw them identified in the Staff Report.

3. Bill Hutchins, petitioner

Mr. Hutchins testified that his wife parks in the driveway, while he and their adult son generally park on the street. He stated that he has never had trouble finding parking. If he or his son comes home late at night, they might not be able to park in front of their house, but can always find a space within a block. They sometimes park on Tulip Avenue, which intersects Holly Avenue two lots down from the subject site and always has lots of parking space available. Mr. Hutchins explained that every house on that part of Tulip has a driveway, and they all park in the driveways. He noted that one of the opposition letters came from a large family that lives across the street from the subject site and has about five cars, so they don't all fit in the driveway. Mr. Hutchins suggested that some people may just like to park in front of their own home, whereas other people don't mind walking half a block.

Mr. Hutchins stated that he and his wife would prefer not to prohibit their tenants from having any cars, although they would be willing to limit their tenants to one car. They would also be willing to park two of their own cars in the driveway so that there would be no net increase in the number of cars regularly parking on the street. (Ms. Knox also consented to this proposal.) Mr.

Hutchins pointed out that the subject site is one block from the Takoma Park Metro Station and almost all of the neighbors use Metro, with the result that many cars are not moved very often.

Mr. Hutchins noted that his house has been featured in The Washington Post and on television shows because of its ecological features, and people come to tour the house regularly – tourists, high schools students, other groups. In addition, he and his wife make their front room available for community meetings and events such as local art shows, so they have a lot of people in and out of the house on a regular basis.

Based on his experience as an architect, Mr. Hutchins opined that density is critical to sustainable growth. He noted that most of the neighbors didn't even know his home contained an apartment, although it had been rented before the Petitioners realized they needed a special exception. People asked whether the Petitioners were planning to build an apartment. Ms. Knox suggested that this shows how little impact their proposed accessory apartment would have.

IV. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. The Zoning Ordinance establishes both general and specific standards for special exceptions, and the petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. The special exception is evaluated in a site-specific context because there may be locations where it is not appropriate. Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that with the proposed conditions, the proposed special exception would satisfy the specific and general requirements for the use.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are "the physical and operational characteristics necessarily associated with the particular use, regardless of its physical

size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” Id. Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed special exception that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed special exception that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

The following may be considered physical and operational characteristics necessarily associated with an accessory apartment: the existence of the apartment as a separate entity from the main living unit but sharing a party wall with it; the provision within the apartment of the necessary facilities, spaces and floor area to qualify as habitable space under the Building Code; a separate entrance and walkway and sufficient exterior lighting; sufficient parking; the existence of an additional household on the site with resulting additional activity including more use of outdoor space and more pedestrian, traffic and parking activity; and the potential for additional noise.

Technical Staff identified no unusual physical or operational characteristics of the use or the site. The Hearing Examiner agrees that the proposed special exception would have no non-inherent operational characteristics, given that it would involve only the rental of a basement apartment. The location and size of the proposed accessory apartment are not unusual, with the apartment located in the basement of the dwelling, an entrance that looks like a basement door into

the house, and a square footage that limits the occupancy to two people. On-site lighting is consistent with typical residential standards. However, the Hearing Examiner considers both the parking situation and the number of other accessory apartments in the immediate vicinity to be unusual site characteristics that should be considered non-inherent adverse effects.

The site has two off-street parking spaces, as required under Section 59-G-2.00(c)(3), but the evidence suggests that parking in the neighborhood is less than ample, due to an urban population density and on-street parking restrictions that limit parking to one side of the street. In the Hearing Examiner's view, the site's location on a street with parking constraints is a characteristic that is not necessarily associated with an accessory apartment and should be considered non-inherent. The testimony indicated that the Petitioners' family has three cars and they expect the tenants to have one car (but no more than one). The Petitioners' commitment to start keeping two cars in their driveway, instead of one, means the proposed accessory apartment would result in no net impact on the number of cars parking on the street. As a result, the Hearing Examiner finds that the parking situation does not impose adverse impacts sufficient to warrant denial of the application.

The subject property is located within a block of three existing, approved accessory apartments on Holly Avenue, and five houses away from a fourth approved accessory apartment around the corner on Eastern Avenue. See map on page six. This is the highest concentration of accessory apartments that this Hearing Examiner has observed in nearly seven years of conducting special exception hearings. During that time, the undersigned estimates that she has conducted hearings in at least 30 accessory apartment cases. This is the first instance in which the proximity of existing accessory apartments has been an issue worthy of discussion.

Under Section 59-G-2.00(c)(2), to approve the present application the Board must find that the proposed apartment will not, when considered in combination with other existing or approved accessory apartments, result in an excessive concentration of similar uses. Under Section 59-G-1.21(a)(7), the Board must find that the proposed special exception will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area

adversely or alter its predominantly residential nature. One could argue that in a general neighborhood with 32 homes, having accessory apartments in four homes, or 12.5 percent of the homes, is too much. However, the Zoning Ordinance provides no guidance as to how many is too many. It is left to the Board's discretion to decide, on a case by case basis, whether an additional apartment will result in "excessive concentration of similar uses" or have an adverse impact on a neighborhood.

Two of the letters in opposition in this case raise a concern about single-family homes in Takoma Park being turned into multi-family homes and leading to neighborhood deterioration. See Exs. 14 and 15. The accessory apartment standards are designed to allow a modest level of rental activity in single family homes while avoiding conditions that can lead to neighborhood deterioration, such as overcrowding and absentee-landlords. Accessory apartments are limited in size to 1,200 square feet and must be subordinate to the main dwelling, i.e. a home cannot be divided into two equally-sized living units to create an accessory apartment. An owner of the building must live in one of the two units for at least six months out of every twelve, so that someone with a financial stake in the property is present on the site at least half the time. The accessory apartment must have the same address as the main dwelling, to avoid the multi-family appearance of multiple mailboxes. In addition, the owners of the home are permitted to receive rent for only one dwelling unit – they cannot have an accessory apartment and at the same time rent out a room in the main dwelling. In the Hearing Examiner's view, these regulatory limits permit a single-family neighborhood to accommodate a number of approved accessory apartments without incurring any noticeable adverse effects.

Petitioner Beth Knox testified that she was aware of the closest apartment because she saw the tenant washing her car one day, but she was not aware of any of the others. She also testified that when people in the neighborhood learned of the present application, some of them remarked that they did not know there was a separate apartment on the subject site, even though it was rented to a tenant for some period. One opposition letter mentioned safety concerns related to a lot of comings and goings at the subject site, but the Petitioners' testimony suggested that most of the comings and goings people notice are probably groups coming to view the environmental features of

the house, or to attend community meetings and other events such as art shows. Such activities are, of course, unrelated to the request for an accessory apartment.

Technical Staff considered the question of accessory apartment concentration and concluded that “the neighborhood will not be oversaturated with contradictory uses because all existing special exceptions are residential in character,” and that “this is a dense area of the County that can benefit from additional dwelling units provided by accessory apartments.” See Staff Report at 6. Staff added that “a higher concentration of accessory apartments here will not likely cause the same adverse effects as a similar grouping of accessory apartments in other areas of the county.” See *id.* at 22.

The only evidence in the record that the proposed accessory apartment could have an adverse effect relates to parking. As discussed in Part II.F., the letters in opposition contend that there is a parking shortage in the neighborhood, but the Petitioners describe parking as readily available within a block of one's home. The Petitioners have effectively resolved this issue by agreeing to keep two of their cars in their driveway, instead of one, so that adding a tenant car would not increase the net number of cars parked on the street. They have also agreed to limit their tenants to one car. As a result of these commitments, which are reflected in the recommended conditions of approval, the Hearing Examiner finds that the proposed accessory apartment is unlikely to have any adverse impact on the general neighborhood. Accordingly, the Hearing Examiner concludes that no inherent or non-inherent adverse effects exist sufficient to warrant denial.

B. Specific Standards

The memoranda submitted by DHCA (Ex. 16, 22), the Staff Report (Ex. 21) and the Petitioners' testimony and written submissions provide sufficient evidence that the specific standards set forth in Section 59-G-2.00 are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) **Dwelling unit requirements:**

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.

Conclusion: Only one accessory apartment is proposed.

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:

- (i) The lot is 2 acres or more in size; and
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.

Conclusion: The proposed accessory apartment is within the basement of the main dwelling.

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.

Conclusion: No addition or extension is proposed.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.

Conclusion: Petitioners represent and Maryland Department of Taxation and Assessments ("MDAT") records confirm that the house was built in 1923.³

Comment: ``

- (5) The accessory apartment must not be located on a lot:

- (i) That is occupied by a family of unrelated persons; or
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.

Conclusion: The main dwelling is occupied by Petitioners, a married couple, and their adult children.

³ The Hearing Examiner hereby takes official notice of MDAT records for this property.

- (6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.

Conclusion: The Hearing Examiner agrees with Technical Staff that the entrance to the proposed accessory apartment preserves the appearance of a single-family dwelling. The apartment entrance is located at the side of the building, down some steps and beneath a secondary entrance into the main dwelling. It has the appearance of a basement entrance into the main home.

- (7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.

Conclusion: No exterior modifications or improvements are proposed.

- (8) The accessory apartment must have the same street address (house number) as the main dwelling.

Conclusion: The accessory apartment would have the same address as the main dwelling.

- (9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet. The 1,200 square feet limitation does not apply to an accessory apartment located in a separate existing accessory structure located on the same lot as the main dwelling. The maximum floor area for a separate existing accessory structure must be less than 50 percent of the total floor area of the main dwelling, or 2,500 square feet, whichever is less.

Conclusion: The proposed accessory apartment is subordinate to the main dwelling because its 650 square feet of space would occupy roughly 20 percent of the full square footage of the structure, and it would occupy only the basement level in a home with three stories. The proposed accessory apartment would not be visually noticeable from the outside as a separate unit, and would be well below the maximum of 1,200 square feet in size.

59-G § 2.00(b) Ownership Requirements

(1) –The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.

Conclusion: Petitioners plan to live in the main dwelling unit.

(2) – Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the petitioner, one year must have elapsed between

the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.

Conclusion: Petitioners acquired the subject property in December 2005, based on

MDAT records.

(3) Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.

Conclusion: Petitioners understand that if the accessory apartment is approved, they

will be legally permitted to receive compensation for only one dwelling unit.

(4) For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.

Conclusion: Petitioners are the owners of the property.

(5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.

Conclusion: Not applicable

59-G § 2.00(c) Land Use Requirements

(1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.

Conclusion: The subject lot is approximately 10,000 square feet in size.

(2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use (see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).

Conclusion: As discussed in Part IV.A. above, the Hearing Examiner concludes,

based on a preponderance of the evidence, that the proposed special exception, if granted, would not result in an excessive concentration of similar uses in the general neighborhood.

(3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:

- (i) More spaces are required to supplement on-street parking; or
- (ii) Adequate on-street parking permits fewer off-street spaces.

Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.

Conclusion: The subject property has two driveway parking spaces and parking is permitted on one side of Holly Avenue. As discussed in Parts III.F. and IV.A. above, the Hearing Examiner concludes that, with the recommended conditions of approval limiting tenants to one car and committing the Petitioners to parking two of their cars in the driveway instead of one, adequate parking space would be available to accommodate the proposed accessory apartment without adverse impacts on the neighborhood.

C. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report, the DHCA inspection report, and the Petitioners' testimony and written submissions support a conclusion that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:
 - (1) Is a permissible special exception in the zone.

Conclusion: An accessory apartment is a permissible special exception in the R-60 Zone.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed special exception would fully comply with the standards and requirements set forth for the use in Code §59-G-2.00, as detailed in Part IV.B. above.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception

must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The Hearing Examiner agrees with Technical Staff's finding that the proposed accessory apartment would be consistent with the recommendations of the *2000 Takoma Park Master Plan* to retain Takoma Park's existing single-family character and to protect and enhance its historic heritage. Permitting homeowners to maximize the value of their homes by creating new rental units encourages investment in historic properties, and an accessory apartment, as a residential use, tends to blend in with the existing residential character of a neighborhood.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.

Conclusion: The proposed special exception would be in harmony with the general character of the neighborhood considering the cited factors. It would have little impact on population density; it would not result in any changes to the exterior of the house; it would result in a modest increase in intensity of use of the property with no change in the character of such use; it would result in only a minimal increase in vehicular traffic; and adequate parking is available on-site and on the street, with the recommended conditions of approval. As discussed in part IV.A. above, the neighborhood already has four approved accessory apartments, but the Hearing Examiner finds, based on a preponderance of the evidence, that an additional accessory apartment would not conflict with or adversely affect the character of the neighborhood.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence demonstrates that due to the modest impacts of the proposed accessory apartment, the special exception would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, provided that it is operated in compliance with the Zoning Ordinance and the recommended conditions of approval

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: Based on the nature of the use and the residential-style exterior lighting, the proposed special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: As discussed in Part IV.A. above, the Hearing Examiner finds, based on a preponderance of the evidence, that the proposed accessory apartment would not, in light of the four existing accessory apartments in the neighborhood, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely. Moreover, given that the proposed use is residential in nature, it would be very unlikely to give the area a non-residential appearance.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

Conclusion: The Hearing Examiner accepts Technical Staff's conclusion that the proposed special exception would be adequately served by the specified public services and facilities.

- (A) If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.
- (B) If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.

Conclusion: No subdivision approval would be required. Technical Staff reports that the proposed accessory apartment would generate one additional vehicle trip during the peak hours, far below the 30-trip threshold that triggers Local Area Transportation Review and below the four-trip threshold that requires peak-hour trip mitigation under the Growth Policy's Policy Area Mobility Review requirements.

- (C) With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.

Conclusion: The Hearing Examiner accepts Technical Staff's finding that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic, particularly with the recommended limit of one car for all tenants.

D. Additional Applicable Standards

In addition to complying with the zoning requirements set forth in Chapter 59-G, an accessory apartment must be approved for habitation by the Department of Housing and Community Affairs. In this case, DHCA staff found that the only repair necessary is to scrape and paint a rusty, exterior handrail. See Exs. 16 and 22.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2723, for a special exception to permit an accessory apartment use in a single-family residential structure located at 7108 Holly Avenue, Takoma Park, Maryland be GRANTED with the following conditions:

1. Petitioners are bound by their testimony and exhibits of record.
2. The accessory apartment may be inhabited by no more than two people.
3. Petitioner must make the repair identified in DHCA's inspection memoranda, Exhibits 16 and 22: scrape and paint rusty, exterior handrail.
4. Tenants in the accessory apartment are limited to one vehicle to be parked in the area of the subject property. The owners of the home must park two of their cars in their driveway at all times when the accessory apartment is occupied by a tenant who keeps a car in the neighborhood.
5. Per Code § 59-G-2.00(b)(1), at least one of the Petitioners must occupy one of the dwelling units on the subject property.
6. Per Code § 59-G-2.00(b)(3), Petitioners must not receive compensation for more than one dwelling unit on the subject property.
7. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits or use-and-occupancy permit, necessary to implement the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and facility comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: June 12, 2008

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner